

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983



JOHN MCILWAIN,

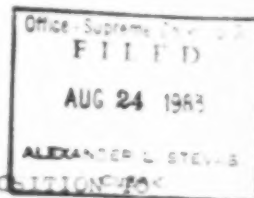
Appellant,

v.

No. 82-6780

UNITED STATES OF AMERICA,

Appellee.



Reply Brief

RESPONSE TO BRIEF OF THE UNITED STATES IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

The government's opposition to the Petition for writ of Certiorari itself gives this Court ample grounds to take this case, for if the United States urges that the following propositions are the law, this Court should have grave doubt that lower courts are adhering to Due Process in this area that lies at the heart of the jury trial right.

1. The government states:

A juror's temporary incompetence to deliberate, standing alone, does not necessarily indicate bias towards a defendant. In this case, no questioned juror even remotely indicated that the foreperson was prejudiced against or hostile towards the defendants.

Opposition at 5.

The government thus suggests that "prejudice" must be equated with "bias against a defendant." It cites no authority for this novel principle, which would permit a defendant to be convicted by a juror who, though not biased, was incapable by virtue of drugs or alcohol "to decide the case solely on the evidence before it." Smith v. Phillips, 455 U.S. 209, 217 (1982).

2. The government then suggests that, in any event, there is a distinction to be drawn between "temporary incapacity to deliberate" and the "total incapacity of an insane juror to function throughout the deliberations." (Opposition at 6.) The government thus asserts that a defendant gets a fair trial even when a juror is incompetent to deliberate so long as that incompetence lasts only a part

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of the deliberations and is not "total". This position is akin to that taken by the Court of Appeals, which formulated a test for Due Process whereby the court would determine whether a juror's incompetence occurred during "significant" deliberations. 454 A.2d at 774. The government's formulation, like that of the Court of Appeals, is not supported by precedent, is unworkable, and would seriously dilute the right to trial by jury. This Court should grant the writ to make clear that an accused cannot be convicted by any juror who was incapable of deciding the case on the evidence during any part of the deliberations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response has been served, by mail, upon Rex E. Lee, Solicitor General, U.S. Department of Justice, and Vincent P. MacQueeney, this 24th day of August, 1983.

A. Franklin Burgess, Jr.
A. FRANKLIN BURGESS, JR.





